not have to worry about others assuming that she was teaching religion in the classroom. *Id.* Ms. Weichert also testified that if Antonio had included anything religious on the poster she would not have accepted it even if it dealt with saving the environment because she did not teach about religion in class. *Id.* at 136. Ms. Weichert testified this way even though she also admitted that persons viewing the poster would think it was created by Antonio and not by the school. *Id* at 140.

On November 1, 1999, Plaintiff filed a Complaint in the United States District Court for the Northern District of New York, Syracuse Division, alleging that Defendants' conduct violated Plaintiffs' right to free speech, freedom of religion, equal protection and that Defendants' actions violated the Establishment Clause of the First Amendment to the United States Constitution. App. 39a. The Defendants filed a Motion to Dismiss the Complaint. On February 2, 2000, a hearing was held before the Honorable Judge Norman A. Mordue on Defendants' Motion to Dismiss the Complaint. *See Peck v. Baldwinsville School Bd. of Educ.*, 7 Fed.Appx. 74, 2001 WL 303755 (2d Cir. 2001). In an order dated February 15, 2000, the District Court, with no notice to the Plaintiffs, converted the Defendants' Motion to Dismiss to a Motion for Summary Judgment and granted final judgment to the Defendants. *Id.* The Second Circuit unanimously reversed the District Court's grant of summary judgment to the Defendants and remanded the case for discovery stating that the conversion of the Motion to Dismiss to a Motion for Summary Judgment without notice to the Plaintiff surprised and prejudiced the Plaintiff. *Id.*

After remand, Plaintiff engaged in discovery, taking the depositions of Ms. Weichert, Principal Creme and Superintendent Gilkey. Defendants also took the depositions

of Antonio, Jo Anne and Kenley Peck. Defendants filed a Motion for Summary Judgment which was granted by the District Court.

Plaintiff appealed to the Second Circuit Court of Appeals a second time. In a unanimous opinion, the Second Circuit Court of Appeals remanded the case for trial on the issue whether the school district engaged in viewpoint discrimination. The Court of Appeals first found that the forum at issue, both Antonio's classroom and the school cafeteria, were non-public fora. App. 17a. The court then found that Antonio's poster was governed by this Court's opinion in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), as opposed to the more rigorous student speech standard this Court announced in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), because the poster was prepared pursuant to a class assignment to reflect what had been taught in the classroom. App. 21a-23a.

In applying the *Hazelwood* standard of whether the school's censorship of Antonio's poster was reasonably related to a legitimate pedagogical interest, the Court of Appeals stated that, "In our judgment, however, the district court overlooked evidence that, if construed in the light most favorable to Pecks, suggested that Antonio's poster was censored *not* because it was unresponsive to the assignment, and not because Weichert and Creme believed that JoAnne Peck rather than Antonio was responsible for the poster's content, but because it offered a religious perspective on the topic of how to save the environment." App. 26a. The Court then held that if sufficient facts were proven, "The District's actions might well amount to viewpoint discrimination." App. 28a.

The Court of Appeals then turned to the question whether *Hazelwood* prohibits viewpoint discrimination.

Acknowledging that the Circuit Courts are in conflict on this point, the Court held that, "[A] manifestly viewpoint discriminatory restriction on school-sponsored speech is prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests." App. 31a.

The Court of Appeals also stated it may be possible "that certain aspects of the record might be developed in such a manner as to disclose a state interest so overriding as to justify, under the First Amendment, The District's potentially viewpoint discriminatory censorship." App. 32a. The Court then mentioned the District's argument that allowing Antonio's poster would constitute an endorsement of religion as potentially presenting such an overriding interest, but left the issue of "whether The District's actions were necessary to avoid an Establishment Clause violation," for the District Court to determine in the first instance. App. 32a-33a.

The Court of Appeals, after affirming the District Court's decision granting summary judgment to the District on the Establishment Clause claim, remanded the case to the District Court for further proceedings. App. 36a. The Defendants then filed their Petition for a Writ of Certiorari.

ARGUMENT

I.

THE SECOND CIRCUIT'S DECISION IS IN COMPLETE HARMONY WITH THIS COURT'S FREE SPEECH PRECEDENT.

The Second Circuit's decision in this case that viewpoint discrimination is impermissible even under the standard announced by this Court in *Hazelwood School District v.*

Kuhlmeier, is in accord with not only the *Hazelwood* decision, but also other free speech precedent from this Court. Thus, there is no reason for this Court to grant the requested writ.

Respondent does acknowledge that the Circuit Courts of Appeal are split on the issue whether viewpoint discrimination is permissible under *Hazelwood*. The First and Tenth Circuits have expressly held that viewpoint-based restrictions on school-sponsored speech are permissible. *See Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Fleming v. Jefferson Cty. Sch. Dist. R-1*, 298 F.3d 918, 926-28 (10th Cir. 2002). While the Ninth and Eleventh Circuits have decided that viewpoint discrimination is impermissible under *Hazelwood*. *See Planned Parenthood of S. Nevada, Inc. v. Clark Cty. Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991 (en banc); *Searcey v. Harris*, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989).

The Third Circuit initially stated in a panel opinion that viewpoint discrimination under *Hazelwood* was permissible, but the en banc court of the Third Circuit was equally divided on that question. *See C.H. v. Oliva*, 195 F.3d 167, 172 (3d Cir. 1999), *vacated and reh'g en banc granted by* 197 F.3d 63 (3d Cir. 1999), *on reh'g en banc* 226 F.3d 198 (3d Cir. 2000).[2]

---

[2] The *Oliva* case involved a student's poster of a picture of Jesus submitted in response to a class assignment to draw a poster about what the student was thankful for. *See Oliva*, 226 F.3d at 201. Zachary's poster was placed on the wall in a prominent location, was removed for a time by unnamed School Board employees, and was placed back on the wall by his teacher in a less prominent location. *See id.* Respondents agree with Justice Alito's dissent in *Oliva* which stated:

I would hold that discriminatory treatment of the poster

Even though the Circuit Courts are in disagreement on the issue whether viewpoint-based discrimination is acceptable under *Hazelwood*, the Second Circuit's opinion in this case was in complete harmony with this Court's decisions both in *Hazelwood* and in established free speech precedent.

A. The Second Circuit's Decision Is In Harmony With This Court's Decision In *Hazelwood*.

The Second Circuit undertook a searching inquiry of this Court's decision in *Hazelwood* and correctly concluded that it could not depart from this Court's clear precedent that viewpoint discrimination is unacceptable under the First Amendment. App. 31a.

In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), a principal had censored two articles drafted by students for the school newspaper. *Id.* at 263-64. The newspaper was written and edited by the Journalism II class at the high school and the Board of Education funded the printing costs of the newspaper. *Id.* at 262. The Journalism teacher would provide the articles to the principal prior to

---

> because of its "religious theme" would violate the First Amendment. Specifically, I would hold that public school students have a right to express religious views in class discussion or in assigned work, provided that their expression falls within the scope of the discussion or the assignment and provided that the school's restriction on expression does not satisfy strict scrutiny. This conclusion follows from the following two principles: first, even in a "closed forum," governmental "viewpoint discrimination" must satisfy strict scrutiny and, second, disfavoring speech because of its religious nature is viewpoint discrimination.

Oliva, 226 F.3d at 210 (Alito, J., dissenting).

publication for review. *Id.* at 263. In reviewing the articles, one which was about the experience of three girls at the school with teen pregnancy and the other about the impact of divorce on students at the school, the principal was concerned that the girls mentioned in the pregnancy article might be identified from the text and that the subject of sexuality was inappropriate for the school paper. *Id.* The principal was also concerned that the student identified in the divorce piece had made personal comments about her parents that the parents should have consented to or had the opportunity to respond to. *Id.* Because of printing timetables, the principal deleted the two pages of the paper on which the articles appeared and the paper was printed as a four page paper instead of a six page paper. *Id.* at 264.

This Court conducted a forum analysis[3] to answer the question whether the school newspaper was a public forum for student speech. *Id.* at 267-70. After reviewing the control the school exercised over the forum and highlighting the curricular nature of the newspaper, this Court concluded that "School officials did not evince, either 'by policy or by practice,' any intent to open the pages of [the newspaper] to 'indiscriminate use,' by its student reporters and editors, or by the student body generally. Instead, they 'reserve[d] the forum for its intended purpos[e].'" *Hazelwood*, 484 U.S. at 270 (quoting *Perry Education Ass'n.*, 460 U.S. at 46- 47 (internal citations omitted)).

---

[3] As the Court of Appeals pointed out in this case, this Court's forum analysis in *Hazelwood* followed its established precedent on forum analysis and free speech in *Perry Education Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37 (1983), and also in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985). *See* App. 30a-31a.

The *Hazelwood* Court stated that educators are allowed to exercise greater control over student speech that occurs as part of the school curriculum that is supervised by faculty members and is designed to impart particular knowledge and skills to the student participants and audiences. *Id.* at 271. The control exercised over the student speech is designed to "assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *Id.* This Court then admonished that, "It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression *has no valid educational purpose* that the First Amendment is so 'directly and sharply implicate[d],' as to require judicial intervention to protect students' constitutional rights." *Id.* at 273 (citations omitted) (emphasis added). This Court then held that the principal's actions in censoring the student articles was reasonable.

Nowhere in this Court's discussion of *Hazelwood* did it countenance viewpoint discrimination of student speech.[4] This Court carefully outlined the circumstances when the school was entitled to a lesser standard of scrutiny in its censorship of student speech. As long as the students "learn whatever lessons the activity is designed to teach," that those

---

[4] In fact, as the Court of Appeals noted, the high school conceded that only viewpoint neutral access to the school newspaper would have passed constitutional muster. App. 30a (citing *Hazelwood*, 484 U.S. at 287 n.3 (Brennan, J., dissenting) ("Petitioners themselves concede that 'control over access' to Spectrum is permissible only if 'the distinctions drawn ... are viewpoint neutral.'") (internal citations omitted)).

reading or listening to the student speech "are not exposed to material that may be inappropriate for their level of maturity," and as long as "the views of the individual speaker are not erroneously attributed to the school," then the school is without power to censor the student speech. *Hazelwood*, 484 U.S. at 271.[5] It is in these circumstances that the school's censorship would have "no valid educational purpose" sufficient to justify the infringement of student speech. *Id.* at 273.

The Court of Appeals in the present case found it "significant that *Hazelwood* analyzed the nature of the expressive forum created by the high school newspaper at issue in the case, and relied, in that analysis, on its prior decision in *Cornelius [v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985)] and *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983)." App. 30a. The Court of Appeals noted that both *Perry* and *Cornelius* "stated that government speech regulations that discriminated among viewpoints were prohibited under the First Amendment. Yet *Hazelwood* never distinguished the powerful holdings of these cases with respect to viewpoint neutrality, or for that matter, even *mentioned*, explicitly, the question of viewpoint neutrality. And we are reluctant to conclude that the Supreme Court would, without discussion and indeed totally *sub silentio*, overrule *Cornelius* and *Perry* - even in the limited context of school-sponsored speech." App. 31a. The Court of Appeals thus declined to depart from what it described as "a core facet of First Amendment protection." *Id.*

---

[5] Of course, the school could censor student speech if it "materially and substantially" disrupted the school environment. *See Tinker* 393 U.S. at 509.

The Eleventh Circuit Court of Appeals likewise found that *Hazelwood* did not establish the right of the school to engage in viewpoint discrimination. *See Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989). The *Searcy* court stated that *Hazelwood* "involved a content based distinction; the principal decided that the subject of teenage sexuality was inappropriate for some of the younger students. There was no indication that the principal was motivated by a disagreement with the views expressed in the articles." *Id.* at 1324-25 (internal citations omitted). The Eleventh Circuit concluded, "Although *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*, we do not believe it offers any justification for allowing educators to discriminate based on viewpoint. The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis. Without more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral." *Id* at 1325 (internal citations omitted).

Indeed, a fair reading of *Hazelwood* leads only to the conclusion that this Court did not allow for viewpoint discrimination against the student speech because the Court simply did not address the issue. It stretches *Hazelwood* beyond a fair reading of that case to say that this Court countenanced viewpoint discrimination against student speech when in fact this Court did not directly address the issue and cited with approval to established First Amendment precedent prohibiting viewpoint discrimination.

Petitioners attempt to blur the line between student speech and government speech by contending that "when teachers and students are engaged in a curricular activity, the speaker

is the school...." Pet. for Cert. at 24.[6] However, *Hazelwood* never establishes that student speech occurring in the curricular context somehow transforms to the government's speech. In fact, *Hazelwood* establishes the exact opposite - that student speech remains student speech even when it occurs in the curricular context. The *Hazelwood* Court was very clear in describing the student speech at issue. The Court stated, "The question whether the First Amendment requires a school to tolerate particular student speech - the question that we addressed in *Tinker [v. Des Moines Independent School District*, 393 U.S. 503 (1969)] - is different from the question whether the First Amendment requires a school affirmatively to promote particular *student*

---

[6] Petitioners make this argument to presumably bring themselves within this Court's statement that, "A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). After making this statement, the Court cited as an example to *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990) and *Hazelwood*, 484 U.S. 260, 270-72. Petitioners argue that this citation proves that this Court meant that any speech governed by *Hazelwood* was government speech. This a specious argument. The Court's citation is more plausibly interpreted as citing to those cases governing the prohibition on the government engaging in viewpoint discrimination of individuals *whose speech the government facilitates*. Indeed, such an interpretation is more consistent with *Hazelwood's* own statement that student speech in the curriculum context is *promoted* by the school - not that the student speech in some way is transformed into government speech simply because it occurs in the curriculum context. Petitioners read too much into *Rosenberger*.

speech." *Hazelwood*, 484 U.S. at 270-71 (emphasis added). Even though the level of constitutional scrutiny changed because of the nature of the forum where the speech was occurring and the characteristics of the school environment, the fact that the speech at issue was *student speech* did not change. Student speech does not transform into government speech simply because it occurs in a curriculum environment. Indeed, the speech at issue in this case was a poster drawn by a kindergarten student. No serious argument could be made that anyone viewing the poster in this case would believe it to be the government speaking. Everyone would see the poster for what it is - the work of a kindergarten student.[7]

Petitioners' argument also flies in the face of this Court's own statement regarding the nature of public schools. This Court was very clear that:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. ... In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. *They may not be confined to the expression of only those sentiments that are officially approved.* In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

Tinker, 393 U.S. at 511 (emphasis added). This Court also

---

[7] As Justice Alito stated in *Oliva*, "Things that students express in class or in assignments when called upon to express their own views do not 'bear the imprimatur of the school,' and do not represent 'the [school's] own speech." *Oliva*, 226 F.3d at 214 (Alito, J., dissenting).

stated, "The classroom is peculiarly the 'marketplace of ideas.'" *Id.* at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

Students are in public schools because they are mandated to be there. However, this Court has made it clear that while there, students may not be closed-circuit recipients of only what the state says and cannot constitutionally be required to express only those sentiments that are officially approved. Petitioners' argument that somehow student speech magically turns into government speech because it occurs in the curriculum context or is otherwise school-sponsored lacks any precedential support.

The Court of Appeals' decision in this case to follow *Hazelwood* and prohibit viewpoint discrimination in the public schools is fully consistent with this Court's decision in that case.

B. The Second Circuit's Decision Is In Harmony With This Court's Established Free Speech Precedent.

Not only is the Second Circuit's decision entirely consistent with this Court's decision in *Hazelwood*, it is also consistent with this Court's well-established free speech precedent regarding viewpoint discrimination. This Court has unambiguously held in numerous cases that the government is prohibited from censoring speech simply because it disagrees with the viewpoint the speech espouses.

In *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993), this Court invalidated a school policy which excluded use of the facilities for religious purposes. The Lamb's Chapel Church sought to show a religious and educational film on the school premises and was denied under

the religious exclusion section of the policy. *Id.* at 386-87. This Court ruled that the film series dealt with an otherwise includable subject and that the exhibition was denied solely because the series dealt with the subject from a religious standpoint. *Id* at 393-94. "The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Id.* at 394 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

In another case, the University of Virginia used student activity fees to fund a wide range of student newspapers but refused to fund a Christian student newspaper. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). This Court found that the school engaged in viewpoint discrimination. *Id.* at 830. Viewpoint discrimination is "presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.*

> *It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.* Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. *Discrimination against speech because of its message is presumed to be unconstitutional.* These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. When the government targets not the subject matter, but particular views taken by speakers on the subject, the violation of the First Amendment is all the more blatant. *Viewpoint discrimination is thus an egregious*

> *form of content discrimination.* The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Id. at 828-29 (citations omitted) (emphasis added). This Court recognized that, "The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Id.* at 835.

Similarly, in *Good News Club v. Milford Central Sch. Dist.*, 533 U.S. 98 (2001), a public school excluded a Christian organization from school facilities after hours. Recognizing that the public school permitted groups to use the same facilities for secular purposes, this Court held "that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination ...." *Id.* at 107.

The foundational cases of this Court's free speech doctrine are in accord in their distaste of viewpoint discrimination.

> Although a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose special benefit the forum was created . . . *the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject.*

Cornelius, 473 U.S. at 806 (emphasis added).

"[T]he state may reserve the [nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to

suppress expression merely because public officials oppose the speaker's view." *Perry Education Ass'n.,* 460 U.S. at 46.

Nowhere has this Court made an exception that the government may engage in viewpoint discrimination against private speech. The prohibition against viewpoint discrimination is absolute.[8] Therefore, the Second Circuit's decision in this case to prohibit viewpoint discrimination is entirely consistent with this Court's foundational free speech precedent. To allow viewpoint discrimination against private student speech, even if it occurs in the curricular context, flies in the face of this Court's absolute prohibition on viewpoint discrimination of private speech by the government.

Because the Second Circuit's opinion is consistent with this Court's decision in *Hazelwood* and also this Court's free speech precedent, this case makes a poor vehicle for review. Therefore, the requested writ should be denied.

II.

IF THIS COURT GRANTS THE WRIT OF CERTIORARI, IT SHOULD ALSO CONSIDER THE UNRESOLVED ISSUE WHETHER THE ESTABLISHMENT CLAUSE IS A VALID COMPELLING INTEREST JUSTIFYING A VIEWPOINT-BASED DISCRIMINATION ON

---

[8] The only area where the government is allowed to make viewpoint distinctions is when it is speaking itself. *See Rosenberger*, 515 U.S at 833 ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."). However, this Court has never allowed the government to engage in viewpoint discrimination against any kind of private speech.

SPEECH.

Should this Court grant the requested Writ of Certiorari, it should also consider the interrelated and subsidiary issue whether the Establishment Clause is a valid compelling interest sufficient to justify a viewpoint-based restriction on speech. The Second Circuit in this case stated:

> In remanding the free speech claim to the district court for further consideration of the viewpoint neutrality issue, however, we do not *foreclose* the possibility that certain aspects of the record might be developed in such a manner as to disclose a state interest so overriding as to justify, under the First Amendment, The District's potentially viewpoint discriminatory censorship. For example, The District has proffered its interest in avoiding the perception of religious *endorsement* as a rationale for not including Antonio's full poster in the environmental assembly. We cannot say, at this time, as a matter of law that The District's concern in this regard would justify viewpoint discrimination.

App. 32a. Therefore, the Second Circuit left open the possibility that the Petitioners could potentially raise a valid Establishment Clause defense to their viewpoint discrimination of Antonio's poster.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court noted that an interest on the part of the government in avoiding an Establishment Clause violation may be a compelling interest justifying *content-based* discrimination against speech. *Id.* at 271. However, this Court went on to hold that the governmental interest was not "sufficiently compelling" to justify content-based discrimination against the religious speech at issue. *Id.* at 278.

"This Court suggested in *Widmar v. Vincent*, 454 U.S. 263, 271(1981), that the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgment of free speech otherwise protected by the First Amendment...." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (parallel citations omitted). However, this Court concluded, "We have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded." *Id.*

In *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001), this Court continued its discussion regarding the proper role the Establishment Clause may play as a compelling interest to justify a restriction on speech. "We have said that a state interest in avoiding an Establishment Clause violation 'may be characterized as compelling,' and therefore may justify content-based discrimination. However, it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination. We need not, however, confront the issue in this case, because we conclude that the school has no valid Establishment Clause interest." *Id* at 112-13 (internal citations omitted).

Therefore, while acknowledging that the issue whether the Establishment Clause may present a compelling interest sufficient to justify viewpoint restrictions on speech, this Court has never directly confronted that issue because it has never found a valid Establishment Clause concern.[9]

---

[9] Respondent believes that the reason for this lack of direct confrontation relates to the fact that private speech cannot violate the Establishment Clause. Therefore, when private speech is at issue, as it will be when viewpoint discrimination occurs, there will

Lower courts have likewise acknowledged the uncertainty surrounding this question and in fact have come to conflicting results on the issue. The Ninth Circuit holds that the Establishment Clause provides a compelling interest sufficient to justify viewpoint discrimination. *See Hills v. Scottsdale Unified Sch. Dist. No. 408*, 329 F.3d 1044, 1053 n.7 (9th Cir. 2003) (stating, "The Supreme Court observes in *Good News Club* that the question 'whether a state's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination' is an open one. ... [T]he question is not open in this Court, as we have upheld exclusions of religious speech in public fora.") (citing *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983-85 (9th Cir. 2003) (holding that censorship of religious speech at graduation ceremony was required to avoid establishment Clause violation)); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1103-05 (9th Cir. 2000) (same). The Fourth and Eighth Circuits have assumed without deciding that the Establishment Clause may constitute a compelling interest to avoid an Establishment Clause violation. *See Child Evangelism Fellowship of Maryland, Inc. v. Montgomery Cty.*, 373 F.3d 589, 595 (4th Cir. 2005) (assuming that a violation of the Establishment Clause constitutes a governmental interest compelling enough to overcome viewpoint discrimination but finding no Establishment Clause violation); *Good News/Good Sports Club v. Sch. Dist. of City of Ladue*, 28 F.3d 1501, 1507-08 (8th Cir. 1994) (holding that viewpoint discrimination can constitute a compelling governmental interest sufficient to justify viewpoint discrimination but finding no Establishment Clause violation)

In contrast, the Third and Tenth Circuits have

---

generally be no valid Establishment Clause concern.

acknowledged the uncertainty in this area, but have not decided one way or the other. *See Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township*, 386 F.3d 514, 530 (3d Cir. 2004) (stating, "The Supreme Court has not settled the question whether a concern about a possible Establishment Clause violation can justify viewpoint discrimination. But we need not decide this issue here, because giving Child Evangelism equal access to the fora at issue would not violate the Establishment Clause." (internal citations omitted)); *Summum v. City of Ogden*, 297 F.3d 995, 1009 (10th Cir. 2002) (noting that, "The Supreme Court has yet to resolve whether a municipality's interest in avoiding an Establishment Clause violation justifies viewpoint discrimination.").

There is uncertainty and conflict among the lower courts on the issue whether the Establishment Clause justifies a viewpoint-based restriction on speech. This Court has acknowledged the uncertainty surrounding this question, but has never directly addressed the issue. This Court, if it accepts this case, should take the opportunity to declare that the Establishment Clause is not a compelling interest to justify viewpoint discrimination of private student speech that happens to occur in the curricular context as under the circumstances of this case. This case presents this issue directly. The record is complete on this issue because discovery has concluded and this case was decided on summary judgment. Therefore, should this Court grant the requested writ, it should also include the interrelated and subsidiary issue[10] whether the Establishment Clause justifies

---

[10] *See* Supreme Court Rule 14.1 (a) "The statement of any question presented is deemed to comprise every subsidiary issue fairly included therein."

viewpoint-based censorship of private student speech.

CONCLUSION

While Respondent acknowledges that the Circuit Courts are split on the issue whether viewpoint discrimination is permissible under this Court's opinion in *Hazelwood*, based on the foregoing, Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari because the Second Circuit's opinion is entirely consistent with *Hazelwood* and this Court's established free speech precedent. In the alternative, Respondent requests that if this Court does grant the Petition, that it also consider the interrelated and subsidiary issue whether the Establishment Clause of the First Amendment to the United States Constitution is a sufficiently compelling governmental interest to justify viewpoint discrimination.

Erik W. Stanley
Rena M. Lindevaldsen
Mary M. McAlister
LIBERTY COUNSEL
100 Mountain View Rd
Suite 2775
Lynchburg, VA 24502

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
LIBERTY COUNSEL
1055 Maitland Ctr Commons
Second Floor
Maitland, FL 32751
(800) 671-1776

Counsel for Respondent

Appendix